

UNITED STATES OF AMERICA,
 v.
 FRANCOIS KARAKE, *et al.*,
 Defendants.

Criminal Action No. 02-0256(ESH)

Based on a telephone conference held on the record on March 3, 2006, during which counsel for each defendant waived his or her client's right to be present, it is hereby

1. The government will be permitted to conduct medical/mental health examinations of the defendants under Fed. R. Crim. P. 12.2 without the necessity of creating a “firewalled” “taint team” distinct from the current prosecution team. Rule 12.2(c)(2) prohibits disclosure of testing results to the government “unless the defendant is found guilty of one or more capital crimes,” “solely” when the examination was “conducted . . . after notice under Rule 12.2(b)(2).” Rule 12.2(b)(2) applies only to “the issue of punishment in a capital case,” *id.*, not to the issue of guilt at trial or the admissibility of relevant evidence at pre-trial proceedings. Though case law on this issue is limited, it appears that taint attorneys have been employed by other courts under Rule 12.2 only when the defendant has given notice of intent to introduce evidence of mental defect as a mitigating factor at sentencing, rather than during the guilt phase of a trial. *See United States v. Johnson*, 362 F.Supp.2d 1043, 1083-85 (N.D. Iowa 2005); *United States v. Sampson*, 335

F.Supp.2d 166, 243-45 (D. Mass. 2004). The firewalls in *Sampson* and *Johnson* were designed to avoid impermissible use by the government of the information obtained from the examinations, as well as to prevent delay at the sentencing stage if the defendant chose to introduce evidence regarding mental condition as a mitigating factor. *Johnson*, 362 F.Supp.2d at 1083; *Sampson*, 335 F.Supp.2d at 245. Here, creation of a taint team would likely cause rather than prevent delay of the suppression hearing scheduled for May 8, 2006, for which the defendants have already given notice of their intent to introduce evidence of mental condition and have provided detailed expert reports to the government. Further, by prohibiting the government from using information obtained during an examination under Rule 12.2(c)(1), or any “other fruits” derived therefrom, for any purpose except to rebut the introduction of evidence regarding mental condition by the defendant, Rule 12.2 minimizes the risk of improper use of the information by the government. Fed. R. Crim. P. 12.2(c)(4).

2. Pursuant to Rule 12.2(c)(1)(B), the Court establishes the following procedures for the examinations:

- a) The scope of the government’s Rule 12.2(c)(1) examinations shall be determined by the content of defendants’ notices under Rule 12.2(b) and accompanying reports of defendants’ medical experts, which the government is entitled to rebut.
- b) The government shall provide three business days notice to the Court and opposing counsel of its intent to conduct an examination under Rule 12.2(c)(1). Such notice shall include an identification of the specialist conducting the examination and, if any, the type of tests to be administered. After such notice is given to opposing counsel by the government, there is to be no communication regarding the testing between defense counsel and the defendant.
- c) The government shall provide to defense counsel an audiotape copy of all examinations conducted under Rule 12.2(c)(1) by close of business on the day after the examination (excluding holidays and weekends).

d) Defense counsel shall provide to the government by March 9, 2006, any raw data collected by its experts during any examination of the defendants related to the defendants' mental or physical health. The government shall provide any raw data collected by its experts during a Rule 12.2(c)(1) examination at the same time that it produces its expert reports related thereto.

e) Defense counsel for each defendant shall provide ten days notice to the government and the Court of their intent to have any expert conduct any further tests or interviews of the defendants.

f) Both sides are instructed to preserve any notes and raw data collected by its experts henceforth.

ELLEN SEGAL HUVELLE
United States District Judge

Date: March 6, 2006